KSM CREDIT & LEASING SDN. BHD.

v.

DATAMAUTE (M) SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C 4942 OF 1985]
27 JANUARY 1986

CIVIL PROCEDURE: *Mareva injunction - Ex parte order - Principles and policy of obtaining and dissolution - Principle of frank and full disclosure.*

The plaintiffs' claim against the first defendants was for amounts said to be due in respect of certain goods the subject of a leasing agreement between the parties. The plaintiffs' claim against the other defendants was as guarantors for the payment by the first defendants of the amounts claimed. The plaintiffs' complaint was that the first defendants had breached certain terms of the lease and that the defendants had improperly purported to sell the goods to other third parties.

The plaintiffs also obtained by way of an *ex parte* application a Mareva injunction to freeze the first defendants' bank account with the Petaling Jaya branch of Hongkong and Shanghai Banking Corporation (the Bank). The application was supported by a certificate of urgency.

The defendants filed a defence and counterclaim to which a reply and defence to the counterclaim was filed by the plaintiffs. The plaintiff then took out an O. 14 application against all the defendants. The defendants applied to dissolve the *ex parte* injunction. They also filed and obtained an interim *ex parte* order which restrained the plaintiffs from selling or otherwise disposing of certain equipment that they had taken away from the first defendants' premises. The plaintiffs then filed an application for an Anton Piller order and this has not yet been heard. This suit involved the hearing of the defendants' application to have the Mareva injunction dissolved.

Held:

[1] The following principles and policy underlying a Mareva injunction were stated (per Abdoolcader FJ in *S & F International Ltd. v. Trans-Con Engineering Sdn. Bhd.* [1985] CLJ (Rep) 280,

(a) a Mareva was never intended to put a plaintiff in the position of a secured creditor. See *Campbell Mussells & Ors. v. Thompson & Anor.* (The Times, 30 May 1984)

(b) The sole purpose of a Mareva was to prevent a plaintiff from being cheated out of the proceeds of an action should he be successful by the defendant transferring assets out of the jurisdiction or dissipating the assets within the jurisdiction (see *PCW (Underwriting Agencies) Ltd. v. Dixon & Anor.* [1983] 2 All ER 158).

(c) Before a Mareva order is granted the plaintiff must first show that he has an arguable case and secondly that there is a risk that the assets will be dissipated which must be demonstrated by solid evidence and thirdly that the Court should take into account the defendant's evidence as well as the plaintiff's in deciding whether to grant the order (see *Ninemia Maritime Corp v. Trave Schiffahrts* [1984] 1 All ER 398).

[2] The principle of frank and full disclosure is expected every time the Court is called upon *ex parte* to exercise its discretion. (see Denning M.R. in *Bank Mellat v. Nikpour* [1985] FSR 87)

[3] The affidavits filed on behalf of the defendants in this case show that in seeking and obtaining the *ex parte* injunction the plaintiffs had suppressed other relevant matters that they must have known of but which they did not disclose to the Court.

[4] If there had been a frank and full disclosure of all the relevant facts the Mareva injunction would not have been granted.

[5] Applying the policy and principles gathered together in *S & F International Ltd.* (*supra*) it is clear that there should not be such an injunction which having been granted ought to be dissolved.

[Ex parte Mareva injunction dissolved.]

Cases referred to:
S & F International Ltd. v. Trans-Con Engineering Sdn. Bhd. [1985] CLJ (Rep) 280
PCW (Underwriting Agencies) Ltd. v. Dixon & Anor. [1983] 2 All ER 158
Ninemia Maritime Corp. v. Trave Schiffahrts [1984] 1 All ER 398
Bank Mellat v. Nikpour [1985] FSR 87

[**Editor's Note:** Notice of appeal was filed on 3 December 85 under reference Supreme Court Civil Appeal 401 of 1985.]

JUDGMENT

VC George J:

The plaintiffs' claim against the first defendants is for amounts said to be due in respect of certain goods which are computers, computer parts and related equipment said to have been leased by the plaintiffs to the first defendants. The plaintiffs' claim against the other defendants is as guarantors for the payment by the first defendants of the amounts claimed. The plaintiffs complain that although the goods were only leased to the first defendants they had in breach of the terms of the lease and in any event improperly purported to sell the goods to other third parties.

Having caused the writ to issue, the plaintiffs took out an *ex parte* summons-in-chambers whereby they sought a Mareva injunction *inter alia* to freeze the first defendants' bank account with the Petaling Jaya branch of the Hongkong & Shanghai Banking Corporation. The injunction sought was on the basis of the contents of the affidavit of the plaintiffs' Operations Manager Richard Wong affirmed on the 19 August 1985 (encl. (2)) wherein he claimed *inter alia* that the plaintiffs were induced into entering into the leasing agreements with the first defendants by fraudulent misrepresentations. What the fraud was, has not been stated with clarity. What appeared to be held out to be fraud was that some of the goods that were leased to the first defendants had even prior to such leasing been sold by the first defendants to United Malayan Banking Corporation Berhad at a price well below their actual value. Some other of the goods that were leased were after they were leased, apparently unlawfully sold by the first defendants to United Asian Bank Berhad and other third parties. Richard Wong in concluding his affidavit stated that the third defendant who is the Managing Director of the first defendant company had told him that he was not worried about legal action which would not stop him from trading using some other companies instead of the first defendants. Richard Wong expressed the opinion that attitude of the Managing Director revealed the defendants are not genuine businessmen and that it would seem that they already had contingency plans to evade judgment. The application was supported by a certificated of urgency. At the *ex parte* hearing of the urgent application on 23 August 1985

attention was particularly drawn to cl. 15 of the lease agreement that prohibited the sale or even with the parting of possession of the goods that were leased. Fly-by-night operators who are not genuine businessman and who lease millions of dollars' worth of goods, even possession of which they are prohibited from passing, but who purport to sell the leased goods to third parties, some such sales taking place even before they had leased the goods, have to be stopped. On the usual undertaking in damages given by the plaintiffs the injunction sought was granted to the plaintiffs.

The writ and statement of claim were duly served on the defendants who entered their appearances to the writ on or about 30 August 1985. They filed and delivered their defence with a counterclaim on or about 13 September 1985. A reply and defence to the counterclaim had also been filed and delivered.

On 2 October 1985 the plaintiffs took out an O. 14 application against all the defendants. On 16 October 1985 the defendants filed their application to have the *ex parte* injunction dissolved (encl. (18)). On the following day they also filed an application to restrain the plaintiffs from selling or otherwise disposing of certain equipment that they had taken away from the first defendants' premises. An interim *ex parte* order so restraining the plaintiffs was obtained. The plaintiffs in their turn have filed an application for an Anton Piller order which is encl. (24) which has not as yet been heard.

At the hearing of the defendants' application to have the Mareva application dissolved which is encl. (18), I was assisted be lengthy arguments by Counsel on both sides and having reserved my judgment and after due consideration, on 27 November 1985 ordered that the injunction be dissolved. I now give the grounds of my decision.

In *S & F International Ltd. v. Trans-Con Engineering Sdn. Bhd.* [1985] CLJ (Rep) 280, Abdoolcader FJ (as he then was) concisely "perpended" the policy and principles underlying a Mareva injunction in doing which he cited *Campbell Mussels & Ors. v. Thompson & Anor.* (The Times, 30 May 1984) for the proposition that a Mareva was never intended to put a plaintiff in the position of a secured creditor, *PCW (Underwriting Agencies) Ltd v. Dixon & Anor.* [1983] 2 All ER 158 which held *inter alia* that the sole purpose of a Mareva was to prevent a plaintiff from being cheated out of the proceeds of an action should he be successful by the defendant transferring assets out of the jurisdiction or dissipating the assets within the jurisdiction, and *Ninemia Maritime Corp v. Trave Schiffahrts* [1984] 1 All ER 398 where Mustill J held that before a Mareva order is granted the plaintiff must first show that he has an arguable case and secondly that there is a risk that the assets will be dissipated which must be demonstrated by solid evidence e.g. defendant's previous actions showing his probity is not to be relied upon or the corporate structure of the defendant infers that it is not to be relied upon or the corporate structure of the defendant infers that it is not to be relied upon and thirdly that the Court should take into account the defendant's evidence as well as the plaintiff's in deciding whether to grant the order.

In *Bank Mellat v. Nikpour* [1985] FSR 87, Denning M.R. reiterated the need when an *ex parte* application for a Mareva is sought for a "full and frank disclosure of all material facts". He went on at p. 89 to state,

> He ought to state the nature of the case and his cause of action. Equally in fairness to the defendant, the plaintiff ought to disclose, so far as he is able, any defence which the defendant has indicated in correspondence or elsewhere...

Lord Denning went further at p. 90,

> I would go further. It seems to me that although there might be an arguable case for the plaintiff bank on the merits, equally on the material which has been put before us, there might be a good arguable defence. So much so that it is not a case in which a Mareva injunction should be granted.

Encik Mathias Chang of Counsel for the plaintiffs in effect submitted that too much weight should not be given to that observation by Lord Denning in that having gone through all the better known judgments, English and Malaysian on Mareva, he had not been able to find anything that had been stated akin to that.

I do not think that Lord Denning was stating a new principle in *Bank Mellat*. What he said there was in elaboration of the principle of frank and full disclosure which is expected every time the Court is called upon *ex parte* to exercise its discretion.

In the instant case while it perhaps could well have been the position that the plaintiffs were not aware of and could not anticipate the defence or defences that the defendants were going to rely on, the affidavits filed on behalf of the defendants show that in seeking and obtaining the *ex parte* injunction the plaintiffs had suppressed other relevant matters that they must have known of. *Inter alia* that the business of the defendants was the selling of the kind of equipment which were the subject of the leases was not disclosed to the Court. The Court was given the impression that the goods leased were to be kept in the possession of and used by the first defendants. While nothing was stated specifically to that effect, it is my view that the impression sought to be given by the plaintiffs and which in fact was given to the Court was that the first defendants were not genuine businessmen but fly-by-night operators operating through the proverbial two-dollar company. It now turns out that it was never intended that, apart from one or two items, the goods the subject of the lease were to be used by the defendants themselves and that it would seem that it was in the contemplation of the parties that the goods were really the stock-in-trade of the first defendants possession of some of which were actually with third parties. It also turned out that far from being fly-by-night operators the first defendants have a paid-up capital of RM100,000 appeared to be respected dealers in the field of computers and related equipment and even have the know-how to be able to produce their own computer software. Apparently the first defendants function from a building owned by them valued at RM810,000 and employ a staff of 43 persons, 70% of whom have had tertiary education. These are all relevant and material facts some if not most of which the plaintiffs must have had knowledge of but which they did not disclose to the Court.

A picture totally different from that painted by the plaintiffs in moving the Court for their *ex parte* injunction has emerged with the filing of the affidavits for and on behalf of the defendants. If there had been a frank and full disclosure of all the relevant facts the Mareva injunction would not have been granted. In any event, applying the policy and principles gathered together in *S & F International Ltd*. (*supra*) it is now clear that there should not be such an injunction which having been granted ought to be dissolved. It was.

Also found at [1986] 1 CLJ 500